

**IN THE UNITED STATES BANKRUPTCY COURT**  
**FOR THE EASTERN DISTRICT OF TENNESSEE**

In re

JANET DELORIS KETRON  
d/b/a CLASSIC DESIGNS,  
GRAND SLAM USA, PARK  
CENTER DEVELOPMENT,  
TOP SIDE DEVELOPMENT and  
EAST TN RETIREMENT CENTER  
SS# 230-62-1336,

Debtor.

No. 00-21840  
Chapter 11

**MEMORANDUM OF DECISION**

This case came before the court for a final hearing on July 3, 2001, upon a "MOTION TO DETERMINE SECURED STATUS UNDER 11 U.S.C. 506 AND BANKRUPTCY RULE 3012" filed by the debtor on April 9, 2001, and the "RESPONSE OF CREDITOR GYC, INC. TO MOTION AND MOTION TO VALUE COLLATERAL" filed that same day. At the conclusion of the hearing, the court rendered its decision on the record. A notice of appeal having been filed by East Tennessee Retirement Community, Inc. ("ETRC") on July 18, 2001, the court submits the following written findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a), as incorporated by Fed. R. Bankr. P. 7052, which findings and conclusions supplement the court's oral ruling. This is a core proceeding. See 28 U.S.C. § 157(b)(2)(A),(B),(K) and (O).

## I.

Janet Deloris Ketron commenced this chapter 11 case on July 14, 2000. Exercising the powers of a debtor in possession, Ms. Ketron filed on March 2, 2001, a "MOTION TO SELL ASSETS UNDER 11 U.S.C. § 363" (the "Motion to Sell"), which sought an order approving a sale to ETRC of four tracts of real property located in Sullivan County, Tennessee and the debtor's membership interest in East Tennessee Retirement Center, LLC. Regarding the four tracts of property, the Motion to Sell states that:

[T]he Debtor would show that all entities holding an interest in this Property have either consented, or will be paid the actual value of their lien. In the event there is a dispute over any lien claims, a sufficient sum of money will be paid over by the Purchaser and escrowed under section #8 of the aforesaid Agreement For Purchase of Real Estate until a hearing can be held to determine the extent or the amount of the contested lien. The debtor will have ten (10) days from the date of entry of the 11 U.S.C. § 363 Order to file any contested liens. The liens remaining uncontested after the ten (10) day period will be paid upon delivery of a release satisfactory to the Debtor.

After the ten (10) day period has passed and the 11 U.S.C. § 363 Order has become final and non-appealable, the Debtor will transfer the property set forth in Exhibit I, the Agreement For Purchase of Real Estate, and Exhibit II, the Purchase Agreement, to the Purchaser free and clear of all liens, encumbrances or taxes. Any outstanding liens, encumbrances or taxes will attach to the proceeds of this sale including the escrowed funds.

The "AGREEMENT FOR PURCHASE OF REAL ESTATE" (the "Purchase

Agreement"), attached as Exhibit I to the Motion to Sell, sets forth the terms and conditions for the sale and details the ownership interests in the four tracts. Park Center Development Partnership, of which the debtor owns a 99.5% interest, owned tracts I and IV, while tracts II and III were jointly owned by the debtor and the Ketron Trust, with each respectively holding 3/4 and 1/4 interests in both tracts. Regarding payment of liens against the tracts, the Purchase Agreement states in paragraph 8 that:

To the extent that the portion of the Purchase Price for any tract is insufficient to pay the amounts due (i) to any secured lender, (ii) to any judgment creditor and (iii) for accrued but unpaid real estate taxes owing on the Closing date, Purchaser agrees to increase the portion of the Purchase Price allocated to such tract by such additional amount as the Bankruptcy Court determines is necessary to pay such secured lender, judgment lien creditor and taxing authority.

The Motion to Sell was served by debtor's counsel upon all parties in interest as well as upon the purchaser, ETRC, along with a notice of hearing for March 20, 2001, which further advised that "[i]f no objections are filed on or before the above hearing date, the relief prayed for in this Motion may be entered on the 20th day of March, 2001 without the necessity for further hearing." There were no objections to the Motion to Sell and an order approving the sale was entered March 28, 2001, which order provided, *inter alia*, that:

[I]n the event there is a dispute over any lien claims, a sufficient sum of money will be paid over by the Purchaser and escrowed under section #8 of the Agreement For Purchase of Real Estate until a hearing can be held to determine the extent or amount of the contested liens. The debtor will have ten (10) days from the date of entry of this Order to file any contested liens and liens remaining uncontested after the ten (10) day period will be paid....

[A]fter the (10) day period has passed and this Order comes final and non-appealable, the Debtor will transfer the Property ... to the Purchaser free and clear of all liens, encumbrances or taxes and any outstanding liens ... will attach to the proceeds of this sale including the escrowed funds.

On April 6, 2001, the debtor filed a "MOTION TO DETERMINE SECURED STATUS UNDER 11 U.S.C. 506 AND BANKRUPTCY RULE 3012" wherein the debtor objected to the "two secured claims filed by Ronal[d] Issacs [sic], John H. Issacs [sic] and James D. Nottingham." At a May 1, 2001 hearing on the motion, debtor's counsel announced that the motion had been resolved and that an agreed order would be tendered. In accordance with that announcement, the court entered on May 9, 2001, an order submitted by debtor's counsel, granting the Isaacs and Nottingham claimants "an approved secured claim in the amount of \$37,519.87." The order also allowed ten days for claimants' counsel to file "an Amended Proof of Claim showing the amount of any unsecured claim with appropriate itemization."

In addition to the motion regarding the claims of Messrs. Isaacs and Nottingham, the debtor filed a second motion entitled

"MOTION TO DETERMINE SECURED STATUS UNDER 11 U.S.C. 506 AND BANKRUPTCY RULE 3012" on April 9, 2001, wherein the debtor objected to the proof of claim filed by GYC, Inc. on September 8, 2000, in the amount of \$57,083.33. It is that motion which is presently before the court.

## II.

According to GYC's proof of claim and as set forth in the debtor's motion, GYC obtained a judgment against the debtor on February 9, 2000, in a Tennessee state court in the principal amount of \$50,000. That judgment was recorded as a lien with the Register for Sullivan County, Tennessee at the Blountville office in Book 36L at pages 155-56 on February 14, 2000, and in Book 10L at pages 688-89 on March 10, 2000, at the Bristol office.

The debtor's motion states that GYC's judgment lien covers only tracts II and III and since the debtor only owns a 3/4 individual interest in these tracts, the lien only attaches to these partial interests. The motion further indicates that along with unpaid taxes and two mortgages, there are four additional judgment liens which have priority over GYC's lien because they were recorded prior in time. The debtor states that the Motion to Sell allocated the total sales price among

the four tracts and that based on this allocation, the debtor's partial interest in tracts II and III, and the additional liens with priority over GYC, "there is no equity to which the Judicial Lien of GYC, Inc. can attach." Accordingly, the debtor "requests that the claim of GYC, Inc. be disallowed as a secured claim and allowed as an unsecured claim in the amount of \$50,000.00."<sup>1</sup> In response, GYC asserts that it has a valid lien upon the debtor's real property and that it is entitled to be paid in full.

Before addressing the merits of the objection, the court notes that it would have been preferable if this matter, along with the debtor's motion concerning the Isaacs and Nottingham claims, had been brought as an adversary proceeding rather than by motion. This preference has more to do with the court's frustration over the piecemeal fashion in which the lien claims are being litigated rather than a belief that an adversary proceeding is required in this instance or that any party's due process rights have been violated. Perhaps it could be asserted that an adversary proceeding was required since arguably the

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<sup>1</sup>It is unclear why the debtor requested that GYC's claim be allowed as unsecured in the amount of \$50,000 when the claim was actually filed in the amount of \$57,083.33. The court assumes that the debtor was referring to the judgment amount of \$50,000 and mistakenly failed to include the accrued interest which was also included in GYC's claim.

matter in some respects concerns the determination of the "validity, priority, or extent of a lien or other interest in property" as included within Fed. R. Bankr. P. 7001(2). However, the claim resolution process is a contested matter generally, see Fed. R. Bankr. P. 3007 and 9014; and Fed. R. Bankr. P. 3012 clearly provides that "[t]he court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion...."

In this regard, it should be noted that the adversary proceeding requirement of Rule 7001 is not jurisdictional and may be waived. *In re Service Merchandise Co.*, 256 B.R. 755, 766 (Bankr. M.D. Tenn. 2000). GYC, the affected creditor, has voiced no objection to the resolution of this matter in the context of a contested matter as opposed to an adversary proceeding. Although the purchaser of the four tracts, ETRC, did file a brief with respect to GYC's claim and the debtor's motion objecting thereto, the brief only addresses the merits of the motion and in no way raises the question of whether the matter is properly before the court. And, despite the filing of a brief by ETRC, neither a representative for ETRC nor its counsel attended the July 3, 2001 hearing.

As this court has recognized previously, "even where there is merit to the argument that a certain matter must be brought

within the context of an adversary proceeding rather than as a contested matter, courts have allowed the matter to proceed on the merits as originally filed where the rights of the affected parties have been adequately protected so that no prejudice has arisen, refusing to elevate form over substance." *In re Timbs*, 178 B.R. 989, 994 (Bankr. E.D. Tenn. 1994). See also *Tully Constr. Co. v. Cannonsburg Env'tl. Assoc., Ltd. (In re Cannonsburg Env'tl. Assoc. Ltd.)*, 72 F.3d 1260, 1264-65 (6th Cir. 1996) (unless the party is able to demonstrate prejudice by the failure to file an adversary proceeding, a court will find that the error constitutes harmless error); *In re Command Services Corp.*, 102 B.R. 905, 908 (Bankr. N.D.N.Y. 1989)("[C]ourts have concluded that where the rights of the affected parties have been adequately presented so that no prejudice has arisen, form will not be elevated over substance and the matter will be allowed to proceed on the merits as originally filed."). Because the parties in the present case have been given a full opportunity to be heard on the merits of the debtor's motion and the court is aware of no prejudice which has resulted from litigating the issue in the context of a contested matter rather than an adversary proceeding, any procedural deficiency is harmless. Accordingly, the court will proceed with resolution of the debtor's motion on its merits.



The debtor does not challenge in her motion the general validity of GYC's judgment lien. To the contrary, debtor's counsel admitted at the July 3, 2001 hearing that GYC was a valid judgment lien creditor on tracts II and III. Additionally, ETRC raised no objection to the validity of GYC's lien in its brief, and as noted, ETRC did not appear at the July 3 hearing and thus presented no evidence disputing GYC's lien as set forth in its proof of claim. Fed. R. Bankr. P. 3001(f) provides that "[a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." "Therefore, absent objection, prima facie proof exists that the creditor has a valid, enforceable and perfected security interest." *In re Hudson*, 260 B.R. 421, 436 (Bankr. W.D. Mich. 2001). In light of this presumption, the debtor's admission, and the lack of any evidence to the contrary, the court concludes that GYC holds a valid judgment lien.

The basis of the debtor's motion is that, regardless of the validity of GYC's lien, GYC is not entitled to be paid from the proceeds of the sale because of the lack of equity in tracts II and III due to superior liens and mortgages. However, there was nothing in the sale documents (i.e., the motion to sell, the exhibits thereto, and the order approving the sale) which would

have placed GYC on notice that the debtor was seeking to avoid or strip off its lien. Granted, the Motion to Sell did indicate that "all entities holding an interest in this Property have either consented, or will be paid the actual value of their lien." And, the Purchase Agreement attached to the Motion to Sell did allocate the total purchase price of \$925,000 among the four tracts, with \$445,000 being the price for tract I, \$330,000 the collective price for tracts II and III, and \$150,000 as the price for tract IV. However, other than the mortgage amounts owed on tracts I, II and III, neither the Motion to Sell nor the Purchase Agreement set forth the lien amounts owed on the various tracts such that a lien creditor could determine the "actual value" of its lien. To the contrary, immediately after the purchase price allocation, the Purchase Agreement recites:

To the extent that the portion of the Purchase Price for any tract is insufficient to pay the amounts due (i) to any secured lender, (ii) to any judgment creditor and (iii) for accrued but unpaid real estate taxes owing on the Closing date, Purchaser agrees to increase the portion of the Purchase Price allocated to such tract by such additional amount as the Bankruptcy Court determines is necessary to pay such secured lender, judgment lien creditor, and taxing authority.

This language and the absence of any other indication that the debtor intended to limit or reduce the amounts payable to judgment lien creditors would lead a lien creditor to conclude from reviewing the Motion to Sell that its lien was going to be

paid in full.

Furthermore, as requested in the Motion to Sell and subsequently granted in the order approving the sale, the four tracts were sold free and clear of all liens and encumbrances. Under 11 U.S.C. § 363(f), a trustee or a chapter 11 debtor in possession may sell property free and clear of another's interest only if one of five scenarios is met. One scenario which allows a sale free and clear of an interest is if "such entity consents." 11 U.S.C. § 363(f)(2). Another is if "such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property." 11 U.S.C. § 363(f)(3).

The Purchase Agreement indicates that one of those two scenarios existed with respect to all entities holding interests in the four tracts and, as a result, the sale was appropriate under the Bankruptcy Code. After the statement quoted above which indicated that the purchase price would be increased to pay all secured lenders, judgment creditors and taxes, the Purchase Agreement goes on to state:

Purchaser and Seller are and will be negotiating settlements with certain holders of judgment liens on the Property whereby those lienholders would accept less than full satisfaction of their respective judgment liens. Those creditors are anticipated to agree in writing to release their liens conditioned upon receipt of the negotiated settlement amounts. The Purchase Price is greater than the aggregate value

of all liens on the Property.

The Purchase Price shall represent a fund available to satisfy claims of creditors of Seller in accordance with the provisions of 11 U.S.C. § 363, as amended.

A logical reading of this language is that although the debtor would seek to negotiate a lower payment to lien creditors, the sale proceeds would be sufficient to pay judgment lien creditors in full. Thus, absent consent by GYC, the court sees no basis as to why its claims should not be paid in full. To hold otherwise would be contrary to the plain language of the Motion to Sell and Purchase Agreement upon which the order approving the sale was based. Accordingly, the debtor's "MOTION TO DETERMINE SECURED STATUS UNDER 11 U.S.C. 506 AND BANKRUPTCY RULE 3012" wherein she requests that GYC's claim be disallowed as secured will be denied.

### III.

Although not raised in the debtor's motion, there were a couple of other issues set forth in GYC's response and the brief of ETRC which should be addressed herein so the district court may be assisted in its review of this case. The first is the observation that while the \$50,000 judgment arose from an action brought by GYC against both the debtor and Park Center Development, LLC, the judgment was only against the debtor.

Thus, any argument that the judgment lien attached to tracts I and IV which were owned by Park Center Development Partnership, as successor in interest to Park Center Development, LLC, is without merit.

The second issue concerns the lien status and effect of two charging orders entered by the Chancery Court of Sullivan County on May 9, 2000, encumbering the debtor's membership interests in both Park Center Development, LLC and East Tennessee Retirement Center, LLC. Although GYC cites these charging orders as an alternative basis for payment in its response to the debtor's motion and in its proof of claim, the debtor's motion only sought to disallow the liens of GYC with respect to the real properties sold in which the debtor had a direct ownership interest, tracts II and III. This court having concluded that GYC has a valid lien against these tracts and is entitled to payment in full, it is not necessary for the court to consider GYC's alternative theory of recovery via the charging orders.<sup>2</sup>

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<sup>2</sup>The court observes, however, as ETRC noted in its brief, that those charging orders were obtained within the ninety-day preference period provided by 11 U.S.C. § 547(b)(4)(A) which raises the possibility of their avoidance by a trustee or debtor in possession.

FILED: August 30, 2001

BY THE COURT

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MARCIA PHILLIPS PARSONS  
UNITED STATES BANKRUPTCY JUDGE